MALAYSIAN REPORTS

Jaffnese Co-operative Society Ltd & Ors v Bank Negara Malaysia & Anor

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NO 02-71 OF 1989
ABDUL HAMID LP, HASHIM YEOP A SANI CJ (MALAYA) AND GUNN CHIT TUAN SCJ
15 AUGUST 1989

Banking - Co-operative bank insolvent and unable to repay its deposit liabilities - Action taken by Bank Negara - Application to appoint receivers to manage affairs of co-operative bank - Whether justified - Essential (Protection of Depositors) Regulations 1986

In this case Bank Negara applied for the appointment of receivers to manage the affairs and property of the Co-operative Central Bank Ltd ('CCB'). The learned trial judge found that the evidence before him showed that all the necessary statutory requirements had been complied with by Bank Negara. The application was made under the Essential (Protection of Depositors) Regulations 1986, and under it Bank Negara had to be satisfied: (a) that the CCB is a deposit-taker under reg 9(1) of the Regulations; (b) that under reg 9(2) Bank Negara is satisfied that the CCB was unable or was likely to become unable to meet its deposit liability to any extent; (c) that Bank Negara had obtained the advice of the Advisory Panel under reg 10 of the Regulations. The appellants appealed.

Held, dismissing the appeal:

(1) The Essential (Protection of Depositors) Regulations 1986 are not repugnant to the Emergency (Essential Powers) Act 1979 nor are they uncertain. The Regulations are neither invalid nor ultra vires the parent act.

(2) The learned judge was correct in holding that all the necessary statutory requirements have been complied with by Bank Negara in this case.

(3) The Regulations are not invalid or ultra vires because they authorize the taking, disposition or acquisition of any property and/or undertaking of a deposit-taker not on behalf of the government of Malaysia. The Regulations have effect under s 2(4) of the Emergency (Essential Powers) Act 1979, notwithstanding anything therein inconsistent with any written law, including the Constitution or the Constitution of any State.

(4) Whatever action Bank Negara chose to take under reg 9(1) of the Regulations was entirely at its discretion. The Regulations are very wide and allow Bank Negara to take whatever action it considers most appropriate in the circumstances for the protection of the depositors of the CCB.

(5) Regulation 9(1) of the Regulations are wide and Bank Negara could also apply to the High Court for any incidental or ancillary orders or directions as may in the opinion of Bank Negara be necessary or expedient including an order to dispose of any property or undertaking of a deposit-taker.

Case referred to
1 Attorney-General v Schonfeld [1980] 1 WLR 1182 (refd)

Legislation referred to
Emergency (Essential Powers) Act 1979 s 2(4)
Federal Constitution art 150
Emergency (Protection of Depositors) Regulations 1986 reg 9

K Ananthan for the appellants.
CV Das and *R Abraham* for the first respondent.
Varghese George for the second respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): 1 *Factual background of this appeal*

The Co-operative Central Bank Ltd ('CCB') was formed on 29 September 1958. As at 31 December 1987 it had 363,749 members, comprising 363,483 individuals and 266 co-operative societies. At the end of 1988, there were 157,052 depositors with a total deposit amounting to $1.8m.

In late 1987 the accounts of the CCB for the financial year ending 31 December 1986 as audited by the firm of auditors Mohamad Awang & Co were published. They showed that the CCB had suffered an accumulated loss of $329m as at 31 December 1986 with the resulting deficit in members' funds of $251m. The CCB was insolvent as the members' funds have been completely wiped out and it was unable to repay its deposit liabilities to any extent. The said audited accounts were tabled and accepted by the CCB at its annual general meeting on 17 December 1989.

Acting on the advice of the Advisory Panel under reg 10 of the Essential (Protection of Depositors) Regulations 1986, ('the Regulations') the Central Bank of Malaysia ('Bank Negara') exercised its powers under reg 9(1)(b) of the Regulations having first been satisfied under reg 9(2) that the CCB was unable or is likely to become unable to meet its deposit liability to any extent. Thus on 7 January 1988 Bank Negara assumed control of the CCB. Bank Negara appointed Encik Harunarashid bin Hj Salleh and Encik Taib bin Abdul Hamid ('the appointees') to assume control of and carry on the business of the CCB on behalf of Bank Negara under the said reg 9(1)(b). This course of action was considered necessary by Bank Negara to protect the interests of the depositors and to facilitate investigations by Bank Negara into the affairs of the CCB under regs 4 and 5 of the Regulations. In addition, the government placed through the Accountant General a sum of $323m with the CCB as a stand-by facility in the event of a rush by the depositors to withdraw their money with the CCB. Without this assistance, the CCB could only refund 60 sen for every ringgit to each depositor.

A firm of auditors, Desa Megat & Co carried out the audit of the CCB's accounts for its financial year ending 31 December 1987. The said auditors took into account all loan repayments made during the period subsequent to 31 December 1987, and before finalization of the accounts at the end of 1988. The audited sets of accounts showed that

that the accumulated loss of the CCB had further deteriorated from $329m in 1986 to $726m as at 31 December 1987. The deficit in members' funds deteriorated from $251m in 1986 to $652m as at 31 December 1987. The CCB was clearly no longer a going concern and was insolvent. Its accumulated loss of $726m was of such a magnitude that Bank Negara considered that a rescue package was required whereby a licenced finance company could acquire the assets and assume the liabilities of the CCB and would ensure full repayment to depositors on a ringgit to ringgit basis including interests thereon.

As stated earlier, it was not denied by the appellants in this case that the audited accounts of the CCB for the financial year ended 31 December 1986 were presented to and adopted by the board of directors and the shareholders of the CCB on 17 December 1987 at their annual general meeting. Those accounts showed that the CCB had suffered accumulated losses of $329m, and was clearly insolvent in 1986. It was also not disputed that Bank Negara brought this action on 28 January 1989 to the High Court for the appointment of a receiver after being advised by the said Advisory Panel under reg 10, but the appellants at the hearing in the High Court alleged that Bank Negara had acted in bad faith in bringing the action.

In April 1987 the CCB's board of directors had commissioned Peat Marwick, another firm of auditors, to examine the operations of the CCB and to submit a report on the CCB to the board. Their report was in fact a severe indictment and criticism of the members of the board and officers of the CCB. In short, it reported that the CCB had been badly managed. It stated that the CCB was technically insolvent as the members' funds had been wiped out by the provisions required for bad and doubtful debts and for diminution in the value of their assets. It recommended that the CCB either urgently increase its capital base to meet its deposit liabilities, or cease operations. The report also stated that the provision of $684m was immediately required to meet the liabilities of the CCB. The members and shareholders of the CCB were unwilling to contribute additional share capital and share deposits in the short term, and the report suggested that the CCB should approach the government for assistance coupled with Bank Negara's supervision if not regulation as envisaged in the recent government White Paper on deposit-taking co-operatives ('DTCs').

The said government White Paper was prepared by the government in November 1986, and its objective was to explain the true position of the DTCs to members of the public and to dispel any doubts as to the necessity of government action relating to the DTCs. A significant number of DTCs were in bad shape financially due to bad management, imprudent and in some cases corrupt management. This resulted in gross mismanagement of funds. The White Paper dealt with the financial position of 24 DTCs. When the White Paper was prepared in 1986, the government was not aware of the CCB's financial problems because its audited accounts for the year ended 31 December 1986 had not yet been prepared. The White Paper therefore did not apply to the CCB but was extensively referred to by the appellants in the High Court action. As pointed out above, CCB's accounts for the financial year 1986 were only presented to and adopted by the CCB's board of directors in December 1987, when the actual extent of its losses was made known.

2 *Proceedings in and the judgment of the High Court*

The said action by Bank Negara was an application by a notice of motion dated 28 January 1989, for the appointment of Tuan Hj Zainal Abidin Putih and Tuan Hj Ahmad Kamal bin Abdullah Al-Yaffi of Hanafiah Raslan Mohamed & Co to be appointed receivers to manage the affairs and property of the CCB without giving security until further order. It was pointed out by Eusoff Chin J that the application was made under the Regulations which were a special law. Bank Negara need only be satisfied firstly that the CCB is a deposit-taker under reg 9(1) of the Regulations and that secondly under reg 9(2) Bank Negara is satisfied that the CCB was unable or was likely to become unable to meet its deposit liability to any extent. The other requirement of the law was that Bank Negara must obtain the advice of the Advisory Panel as provided for in reg 10. The learned judge found that the evidence before him showed that all the necessary statutory requirements had been complied with by Bank Negara. He was satisfied that Bank Negara had produced evidence to the court to show that the financial position of the CCB was in such a bad state that it had insufficient funds to pay money to any of its depositors who wish to withdraw their deposits with the CCB.

After the said notice of motion was filed, the appellants and four others applied by summons-in-chambers dated 18 February 1989 and were allowed by the learned judge on 20 February 1989 to intervene in the said action by Bank Negara. The learned judge noted that the intervenors in their affidavit did not deny Bank Negara's allegation that the CCB was unable to meet its deposit liability and was insolvent. They merely contended that the government should continue to assist the CCB by pumping more money into it to keep it afloat and to allow it to implement Peat Marwick's recommendations in its report to try to improve CCB's financial position. The learned judge was of the view that the intervenors failed to see that the government's involvement in giving financial assistance through the Accountant General was purely to protect the depositors for whom the Regulations were made by the Yang di-Pertuan Agung. He was of the view that if Bank Negara stopped injecting more funds into the CCB it would sink immediately because according to Peat Marwick's report the CCB was not a going concern and

was already insolvent. The learned judge noted that the intervenors had conceded and admitted in their affidavits that none of the CCB members, be they individuals or societies, was willing to contribute additional share capital or share deposit in the short term, which clearly showed that the principal owners of the CCB themselves had no more confidence in it as a going concern.

As regards the allegations of the intervenors that Bank Negara had acted mala fides in bringing the action under reg 9(1)(c) of the said Regulations in unholy haste or in singling out the CCB for harsh treatment, or that Bank Negara had exaggerated CCB's liability by deflating its assets to create a picture of insolvency, the learned judge stated that he could find no evidence at all to substantiate those allegations. On the contrary, he found that the evidence showed that Bank Negara had acted fairly. He noted that Bank Negara had taken action under reg 9(1)(b) on 7 January 1988 to appoint Encik Harunarashid bin Hj Salleh and Encik Taib bin Abdul Hamid to assume control and to carry on the business of the CCB on behalf of Bank Negara. Those two appointees have, since assuming office, instituted legal actions against the borrowers who had defaulted, or who had refused to accept repayment proposals, and there are now pending 70 legal actions to recover 109 non-performing large commercial loans.

As regards the legal issues raised by Mr K Ananthan, counsel for the appellants and the other four intervenors in the High Court, the learned judge rejected the suggestion of counsel that the Regulations were unconstitutional because it appeared that reg 9(1)(c) enables the receiver to sell the assets of CCB without paying compensation to the owners and members of the CCB. The learned judge referred to s 2(4) of the Emergency (Essential Powers) Act 1979 which states as follows:

> 2(4) An Essential Regulation, and any order, rule or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any States, other than this Act or in any instrument having effect by virtue of any written law other than this Act.

He also pointed out that the said Act was enacted under cl 5 of art 150 of the Federal Constitution and it is provided under art 150(6) that no provision of any ordinance promulgated under art 150 shall be invalid on the grounds of inconsistency with any provision of the constitution.

Mr Ananthan also submitted in the High Court that the Regulations could not be invoked unless the conditions existing at the time the Regulations were made are still existing. Although counsel agreed that the Regulations were passed to secure the maintenance of public order, yet he contended that such a situation was no longer existing as depositors in this case were not running around to the CCB causing public disorder to withdraw their deposits. The learned judge did not agree with that contention and considered that although s 2(1) of the Emergency (Essential Powers) Act 1979 provides the grounds on which the Yang di-Pertuan Agung may exercise his powers to make any regulations whatsoever, yet he considered that the exercise of the powers granted to Bank Negara under the Regulations did not depend on whether the conditions and reasons for making the Regulations under s 2 of the said Act must still exist.

On the issue whether reg 9(2), which is as follows:

> 9(2) The powers of the Central Bank under paragraph (1) shall not be exercised in relation to a co-operative society unless the Central Bank is satisfied that the co-operative society is unable, or is likely to become unable, to meet its deposit liability to any extent.

applies to all actions to be taken by Bank Negara under reg 9(1), the learned judge considered the answer to be in the, affirmative as reg 9(2) was crystal clear to him.

Another contention of counsel was that there now exists two sets of laws for the cancellation of the registration of a co-operative society, that is, one under the Regulations and the other under the Co-operative Societies Act 1948 (Rev 1983). The learned judge expressed the view that reg 9(1)(e) gives power to Bank Negara to require the Registrar-General of Co-operative Societies to make an order for the cancellation of the registration of a co-operative society, without having to comply with all the provisions of the Co-operative Societies Act before effecting such cancellation and the Registrar-General is bound to comply with the requirement of Bank Negara. He held that although there were now two sets of laws concerning the cancellation of a co-operative society, reg 9(1)(e) overrides the provisions in the Co-operative Societies Act 1948.

As regards the contention of counsel that Bank Negara should have taken action under reg 9(1)(e) instead of under reg 9(1)(c), the learned judge's view was that whatever action Bank Negara chose to take was entirely at its own discretion. It was up to Bank Negara to decide what was the most appropriate action under the Regulations so as to protect the interests of the depositors. Finally, on the contention of counsel that the directors of the CCB should have been allowed to meet or deliberate before the decision of Bank Negara to take action under reg 9(1)(c), the learned judge did not think that Bank Negara's failure or refusal to meet the board of directors of the CCB or any of the intervenors to discuss the rescue package Bank Negara had in mind for rescuing the CCB from its financial difficulties showed that Bank Negara had acted mala fides in bringing the said action.

Having considered all the arguments of the appellants, the learned judge allowed the application of Bank Negara on 7 March 1989, and ordered that Tuan Hj Zainal Abidin Putih and Tuan Hj Ahmad Kamal bin Abdullah

Al-Yaffi of Hanafiah Raslan Mohamed & Co be appointed receivers to manage the affairs and property of the CCB without giving security until further order and to do one or more of the acts prayed for in paras (i) to (xix) of the said notice of motion. The receivers appointed were also authorized and permitted to represent and protect the interests and investments of the CCB in all subsidiaries and associated companies and in other co-operatives or bodies in which the CCB has an interest. The receivers were also authorized, in consultation with Bank Negara, to get in and participate in the activities of the aforementioned entities and make decisions and take all actions as if they were the duly authorized representatives of the CCB. The parties were given liberty to apply and costs was ordered to be borne by the intervenors.

3 *The appeal and our decision*

Four of the eight intervenors, namely, the abovenamed appellants, were dissatisfied with the decision of the learned judge given in the High Court on 7 March 1989, and appealed against the whole of his decision. There were 14 grounds in their memorandum of appeal which concerned the issues raised in the High Court as well as some other issues which were not raised in the court below. Mr Ananthan began his submission by referring to the said government White Paper which, he pointed out, was concerned with the DTCs and their financial position. He then referred to the Regulations and stated that they were originally made to enable Bank Negara to investigate and control the DTCs and contended that it was wrong to compare the 24 DTCs with the CCB. Then on the appellants' first ground of appeal which was as follows:

> 1 The learned trial judge erred in law in not holding the Essential (Protection of Depositors) Regulations 1986 (hereinafter referred to as 'the Regulations') to be invalid/ultra vires for any one of the following reasons:
>
> (a) that the Regulations are capable of being applied for purposes not prescribed in s 2 of the Emergency (Essential Powers) Act 1979; or
> (b) that the Regulations empowered the taking/disposition of the property and/or undertaking of a deposit-taker not on behalf of the government; or
> (c) that the Regulations authorized the acquisition of land assets of a deposit-taker, contrary to s 2(2)(g)(ii) of the Emergency (Essential Powers) Act 1979; or
> (d) that the Regulations authorized the acquisition of the property of the deposit-taker with neither pre-acquisition right of hearing nor compensation upon such acquisition;

Mr Ananthan referred to pp 325 and 329 of *Craies on Statute Law* (7th Ed) wherein the learned author had stated that there are the following five main grounds on which by-laws might be treated as ultra vires:

(a) That they are not made, sanctioned and published in the manner prescribed by the statute which authorizes the making of them.
(b) That they are repugnant to the laws of England.
(c) That they are repugnant to the statute under which they are made.
(d) That they are uncertain.
(e) That they are unreasonable.

Counsel stated that he was relying on grounds (c) and (d) above but did not indicate or satisfy us how or in what way the Regulations in this case are repugnant to the Emergency (Essential Powers) Act 1979, or are uncertain.

We however considered that the Regulations are not repugnant to the Emergency (Essential Powers) Act 1979, nor are they uncertain. We also considered that the Regulations are neither invalid nor ultra vires the parent Act for any of the reasons stated in the appellants' first ground of appeal. The Yang di-Pertuan Agung's powers under the Emergency (Essential Powers) Act 1979 were to make any regulations whatsoever which he considers desirable or expedient for the purposes mentioned in the Act and the Regulations in our view are related to the purposes contemplated by the said Act, as for example, the maintenance of public order and of supplies and services essential to the life of the community. It is true that the Regulations were made in 1986 to deal with the crisis in the co-operative movement and for the protection of the depositors of the 24 DTCs. But that does not mean that the Regulations cannot now be invoked for the protection of the depositors of the CCB, provided that Bank Negara is, in accordance with the provisions of the Regulations, satisfied that the CCB is a deposit-taker as defined in the Regulations and that in relation to a co-operative society, also as defined in the Regulations, Bank Negara is also satisfied that it is unable or is likely to become unable to meet its deposit liability to any extent. Bank Negara should also have the prior advice of the Advisory Panel established under sub-s (2) of s 31A of the Central Bank of Malaysia Ordinance 1958. We agreed with the learned judge that all the necessary statutory requirements have been complied with by Bank Negara in this case.

We also did not accept the contention of counsel that the Regulations are invalid or ultra vires because they authorize the taking, disposition or acquisition of any property and/or undertaking of a deposit-taker not on behalf of the Government of Malaysia. Although the Regulations enable Bank Negara to take various actions, Bank Negara is, in our view, an agent of the government of Malaysia, which has been directly and specifically given powers by the Regulations to take any of the actions referred to therein and there is no need for any delegation of such powers to it by the government of Malaysia. Moreover the Regulations which are in the nature of emergency powers need not provide for any pre-acquisition right of hearing or compensation upon such acquisition. We agreed with the learned judge that the Regulations have effect under the above-quoted s 2(4) of the Emergency (Essen-

tial Powers) Act 1979, notwithstanding anything therein inconsistent with any written law, including the Constitution or the Constitution of any State.

As regards the contention that there was absence of any evidence of the need to invoke the Regulations for the purposes prescribed in s 2 of the Emergency (Essential Powers) Act 1979, we were satisfied that there was sufficient evidence adduced to show that the CCB was, because of the lack of prudence in lending and proper control by the board and the senior management of the CCB, in dire straits and has been insolvent since 1986 and that any rescue package scheme could only be properly implemented if the CCB was placed in the hands of qualified independent accountants and managers to be appointed as receivers under the Regulations. There was also evidence that withdrawal of deposits from the CCB early this year would not have been stemmed if the government and Bank Negara had not taken active steps to persuade institutional depositors like the Penang Port Commission and the Rubber Industry Smallholders Development Authority to refrain from withdrawing their deposits. Efforts were also made to dissuade Perbadanan Kemajuan Negeri Selangor and Lembaga Letrik Negara from withdrawing their deposits although those efforts were not successful. The government extended a stand-by facility of $323m to the CCB in early 1988 to provide liquidity in the event of a run on the CCB. The Accountant General had also agreed not to withdraw its deposits in the CCB temporarily. Those measures helped to stem the occurrence of a heavy run on the CCB. The $323m stand-by facility has already been fully utilized. A sum of $100m was used to settle borrowings and fund withdrawals in January 1988. The balance was used in January 1989 to fund heavy withdrawals of deposits and to settle borrowings. So in our judgment there was ample evidence of the need to invoke the Regulations in this case.

Another contention of counsel was that Bank Negara should have acted under reg 9(1)(e) which is as follows:

> In the case of a co-operative society, require the Registrar-General of Co-operative Societies to make an order for the cancellation of the registration of the co-operative society, and the Registrar-General shall accordingly cancel the registration of the co-operative society and shall have the power to do so upon being so required notwithstanding anything contained in the Co-operative Societies Act 1948;

He contended that as Bank Negara had acted under reg 9(1)(c) it meant throwing out all the provisions of the Co-operative Societies Act 1948 (Rev 1983) which, he submitted, was not the intention of the legislature. With respect, here again we rejected that contention because we agreed with the views of the learned judge that whatever action Bank Negara chose to take under reg 9(1) was entirely at its discretion. The Regulations are, in our view, very wide and allow Bank Negara to take whatever action it considers most appropriate in the circumstances for the protection of the depositors of the CCB.

Yet another submission of Mr Ananthan was that a receiver under reg 9(1) (c) can only manage the affairs and property of the deposit-taker and not sell them. We appreciate that 'the power to appoint a receiver is purely equitable in its origin; and was one of the oldest remedies of the Court of Chancery. The remedy is one to be moulded to the needs of the situation; within proper limits a receiver may be given such powers as the court considers to be appropriate to the particular case' (per Sir Robert Megarry VC in *Attorney-General* v *Schonfeld*[1] at p 1187). But in this case we considered that the powers given to Bank Negara under the Regulations and in particular the words used in the following reg 9(1)(c):

> apply to the High Court to appoint a receiver to manage the affairs and property of the deposit-taker and for such incidental or ancillary orders or directions in relation to such appointment as may, in the opinion of the Central Bank, be necessary or expedient;

are wide and that Bank Negara could also apply to the High Court for any incidental or ancillary orders or directions as may in the opinion of Bank Negara be necessary or expedient, including an order to dispose of any property or undertaking of a deposit-taker.

Mr Ananthan also submitted that the appellants had some legitimate expectation in that the said White Paper had created and encouraged an expectation amongst the appellants and the owners of the CCB that their views would be sought and their approval obtained before implementation of any rescue scheme. He stated that there were promises made by the government in that White Paper. We however considered the government White Paper to be of no relevance to the interpretation of the Regulations and that whatever was stated in the government White Paper in November 1986 did not give the appellants any legitimate expectation of an opportunity to make representations when Bank Negara decided to take action under reg 9(1)(c) in the year 1989.

Finally, we rejected the submission of counsel that the powers granted by the Regulations should only apply to illegal co-operatives and that legal co-operatives should be governed by reg 9(1)(e). We did not agree with that submission as in our view there is no reason for the application of reg 9(1)(a), (b) and (c) to be restricted to illegal co-operatives only. We would also add that reg 9(1)(e) has the same object as reg 9(1)(d) and (f), ie they may be invoked when Bank Negara wants to apply to the High Court to wind up a corporation or to cancel the registration of a co-operative society or to cancel the licence of a pawnbroker, notwithstanding the provisions of the Companies Act 1965, the Co-operative Societies Act 1948, or the Pawnbrokers Act 1972, as the case may be.

Having heard and considered the submissions of counsel for the appellants we did not think it necessary to

call on Mr C Das, counsel for the first respondent and Mr Varghese George, counsel for the second respondent, to address us. For the reasons stated above, we dismissed the appeal but made no order as to costs after hearing the brief supplicatory address of Mr Ananthan who informed us that the members of all the appellants are not people of means but are only wage earners.

Appeal dismissed.

Solicitors: *Skrine & Co; Shook Lin & Bok; Zain & Co.*

Reported by *Prof Ahmad Ibrahim*

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NO 220 OF 1987
LEE HUN HOE CJ (BORNEO), HASHIM YEOP A SANI AND MOHAMED YUSOFF SCJJ
26 JULY 1989

Contract - Guarantee - Demand for payment - Whether carbon copies of demand meant for borrower sent to guarantors constitute proper demand

Banking - Loan - Guarantee - Demand for payment - Whether carbon copies of demand meant for borrower sent to guarantors constitute proper demand

The respondents in this case were bankers and had granted to a housing developer an overdraft facility of $100,000. The said facility was secured by joint and several guarantees of the directors of the housing developer, including the appellant. The housing developer defaulted and was in breach of the said facility. The respondents sent a demand letter to the housing developer requesting it to settle the excess and to regularize the account. Carbon copies of the said letter were sent to all the guarantors including the appellant. The notice was ignored and the respondent filed an action against the housing developer and the guarantors. The appellant filed a defence to the effect that no formal letter of demand was served on him and therefore the respondents have no cause of action against him. The senior assistant registrar gave him unconditional leave to defend. On appeal the learned judge of the High Court allowed the appeal. The appellant appealed to the Supreme Court.

Held, allowing the appeal: The learned judge was wrong in holding in this case that no antecedent demand was required to create a cause of action and that the mere filing of the writ and the service thereof was a sufficient demand obliging the appellant to pay. Here the letter of guarantee is clear. A proper demand must be made and it is a condition precedent to establishing a claim against a guarantor.

Cases referred to

1 *Royal Bank of Canada* v *Oram & Ors* [1978] 1 WWR 564 (refd)
2 *Royal Bank of Canada* v *Ruben* [1978] 48 APR 707 (refd)
3 *Mok Hin Wah* v *UMBC* [1987] 2 MLJ 610 (follid)
4 *United Prime Corporation Berhad* v *Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501 (distd)
5 *Bradford Old Bank Ltd* v *Sutcliffe* [1918] 2 KB 833 (refd)
6 *Esso Petroleum* v *Alstonbridge Properties* [1975] 1 WLR 1474 (refd)
7 *Public Bank* v *Chan Siok Lee* KL High Court Civil Suit No 3599 of 1985 (refd)

Lambert Rasa-Ratnam for the appellant.
JJ Sugunasingam for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We allowed the appeal. We now give our reasons. This appeal is concerned with the question of the requirement of a proper demand to be issued to a guarantor.

The facts may be stated shortly. The plaintiffs are bankers and the first defendant is a housing developer. The plaintiffs granted the first defendant an overdraft facility of $100,000. Interest was to be at the rate of 15% pa with monthly rests. The said facility was to be regularized by the first defendant upon demand by the plaintiffs. The said facility was secured by joint and several guarantees of the second, third, fourth and fifth defendants who were directors of the first defendant. The guarantees were given in their personal capacities. The first defendant defaulted and was in breach of the said facility. Despite several reminders requesting the first defendant to adjust the said facility the first defendant failed to do so. By a demand letter dated 18 December 1982 the plaintiffs requested the first defendant to settle the excess and also to regularize the account within seven days. In the said letter the plaintiffs gave notice that if the demand was not complied with they would instruct their solicitors to proceed with legal action against the first defendant and the other defendants. Carbon copies of the said letter was sent to each of the other defendants. All the defendants ignored the said notice. The plaintiffs then filed an action against them claiming the sum of $120,409.13 as at 28 February 1983 with interest thereof at the contractual rate. Judgment in default was obtained against the first, second, fourth and fifth defendants. The third defendant filed a defence to the effect that no formal letter of demand was served upon him and therefore the plaintiffs had no cause of action against him. The senior assistant registrar gave him unconditional leave to defend. In allowing the appeal the learned judge said he was not impressed with his line of argument. Thus the matter came before us.

The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by